SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-391

ROBERT MORGAN,

Petitioner,

v.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is now reported at 481 F.2d 122.

QUESTION PRESENTED

Whether petitioner, a California farmer, may sue for damages under Section 4 of the Clayton Act for a diminished crop yield claimed to result from increased air pollution assertedly caused by respondent automobile

manufacturers' alleged conspiracy to restrain competition in the development, manufacture and installation of emission control devices on motor vehicles.

INTRODUCTION

This action, brought by a California crop farmer in the Eastern District of Pennsylvania on behalf of a class of all farmers in the United States, is one of thirty-eight cases which have been consolidated for co-ordinated pretrial proceedings in the Central District of California. *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349 (J.P.M.L. 1970).[1] Petitioner seeks damages under the antitrust laws for alleged injuries to his crops from air pollution said to be traceable to an agreement among respondents not to compete in the development, manufacture, and installation of emission control devices on motor vehicles. He claims to represent "hundreds of thousands" of farmers throughout the United States who raise crops of any kind.[2]

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[1] *See Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 n.7 (1972). These cases were inspired by the civil antitrust action filed by the federal government against some of the respondents, which was terminated by entry of a consent decree on October 29, 1969. *United States* v. *Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom., City of New York* v. *United States*, 397 U.S. 248 (1970). When he approved entry of the consent decree, Judge Curtis pointedly noted for the record the "novel and unadjudicated theory" of the government's case, 307 F. Supp. at 621.

The District Court for the Central District of California has set for trial the injunctive claims under Section 16 of the Clayton Act, 15 U.S.C. § 26, in two of the cases originally filed in that court. Motions for summary judgment against the plaintiffs in those cases are presently under consideration by the Court, as is a motion relating to the availability of the equitable relief the plaintiffs are seeking.

[2] The Court of Appeals did not reach the class question, but strongly suggested that the purported farmer class would be im-

Petitioner does not allege any connection with or involvement in any transaction in that area of the economy which he alleges was restrained by respondents' conduct, *i.e.*, the development, manufacture, and installation of motor vehicle emission control devices. He does not even claim to be a purchaser of a vehicle manufactured by a respondent or to have suffered injury resulting from any commercial dealings with respondents. Indeed, petitioner concedes in this Court that "[h]e has no indirect or direct market relationship with the [automobile] industry . . . ." Pet. at 26. Rather, petitioner claims only that respondents' alleged agreement to eliminate competition in the development of control equipment (Complaint, para. 23) resulted in hindering and delaying the development of such equipment (Complaint, para. 24), which in turn resulted in the emission of additional air contaminants into the atmosphere (Complaint, para. 25), which in turn contributed to photochemical reactions resulting in the formation of "smog" (Complaint, para. 19), which in turn caused damage, in some unspecified manner and amount, to his crops (Complaint, para. 19, 26).

Accordingly, respondents moved to dismiss petitioner's claim for damages on the ground that he failed to satisfy the statutory requirements for standing to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15. The district court denied the motion (Pet. App. at A20), but certified the question to the Court of Appeals under 28 U.S.C. § 1292(b).

The Court of Appeals reversed, holding that petitioner did not have standing under Section 4. Declaring unac-

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proper because of the predominance of individual questions arising from the fact that the large number of farmers whom petitioner sought to represent "produce a variety of crops in differing locations and conditions throughout the United States." Pet. App. at A18 n. 14. These differences would require extensive individual proof on the issues of impact and damages as well as cause great administrative problems.

ceptable any approach which would "arbitrarily foreclose otherwise meritorious claims," the court rejected the use of "talismanic rubrics" to decide questions of standing. Pet. App. at A9. Instead, the Court of Appeals held that Section 4 should be available to any person suffering commercial injury as a result of his participation in

> "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[3]

In applying this basic principle the Court of Appeals adopted a two-step approach:

> "[1] identification of the affected area of the economy . . .
>
> "[2] ascertainment of whether the claimed injury occurred within that area." Pet. App. at A12.

In taking step one, the court relied on petitioner's complaint to identify "research, development, manufacture, installation and patenting of automotive air pollution control devices" as the relevant "affected area of the economy"—that is, the "target area" of the alleged conspiracy. Pet. App. at A12. In taking step two, the court below concluded that:

> "No commercial interest of the crop farmers falls within this area." *Id.*

Accordingly, the court ruled that petitioner did not have standing under Section 4.[4]

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[3] Pet. App. at A12, quoting *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See also Mulvey* v. *Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Hoopes* v. *Union Oil Co. of Calif.*, 374 F.2d 480 (9th Cir. 1967); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

[4] *Id.* The Court of Appeals also ruled that the governmental entity plaintiffs, who have brought 33 of these 38 consolidated cases, lacked standing under Section 4 because they alleged no injury to

ARGUMENT

I. The decision of the Court of Appeals applied well-established principles governing standing under Section 4 of the Clayton Act and raises no question justifying issuance of the writ of certiorari.

Petitioner's primary contention in this Court is that the court below erred in imposing any limitation upon standing under Section 4 other than that a treble damage plaintiff must have suffered some injury. In petitioner's view, the lack of any commercial relationship here between the injury claimed and the alleged violation is simply irrelevant.[5] This Court has consistently rejected such contentions. The antitrust laws do "not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945); *see also Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Indeed, the position advanced by petitioner was rejected by this Court as recently as *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251 (1972). In *Hawaii* this Court, citing ten decisions of the Courts of Appeals, noted with approval that "[t]he lower courts have been virtually unanimous in

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their "business or property." Pet. App. at A6. These plaintiffs have not sought review of the decision below; but their claims for relief under Section 16 are still under consideration in the District Court, the Court of Appeals having "intimate[d] no conclusions as to either the merits of the equitable claims or the availability of any form of injunctive relief." Pet. App. at A15.

[5] Similarly, petitioner evidently sees no significance in the attenuated nature of the causal relationship between his claimed injury and the alleged violation. To be sure, petitioner appears at certain points in his brief not to take issue with what he says is the unanimous view of the Court of Appeals that " 'remote' or 'incidentally' damaged parties cannot sue to redress antitrust violations." Pet. at 8; *cf.* Pet. at 26. Yet given the remote and incidental nature of his own injury, as portrayed in the allegations of his complaint (see p. 3, *supra*), it seems clear that petitioner is really contending that an allegation of any cause-and-effect linkage between violation and injury—no matter how weak or how long—is enough to confer standing under Section 4.

concluding that Congress did *not* intend the antitrust laws to provide a remedy in damages *for all injuries that might conceivably be traced to an antitrust violation.*" *Id.* at 263 n.14 (1972) (emphasis supplied).

Petitioner's demand for a change in the standing requirements of Section 4 is premised largely upon an out-of-context use of language in such cases as *Radovich* v. *National Football League*, 352 U.S. 445, 453 (1957), *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Company*, 364 U.S. 656, 660 (1961) and *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). In none of these cases, however, was there any question of the plaintiff's participation in the economic "target area" endangered by the alleged violations. In each case the issue before this Court was whether a violation of the substantive provisions of Section 1 was properly alleged, not whether the plaintiff had standing to bring an action under Section 4. In *Radovich* and *Radiant Burners* the plaintiffs were engaged in the very lines of commerce where the alleged restraints had occurred: professional football and gas powered appliances. Similarly, in *Mandeville* the violation alleged was price fixing by buyers of sugar beets, and plaintiff was a seller of sugar beets.[6]

Under the standing cases noted with approval in *Hawaii*, a claim of some injury is only part of the requisite showing; a treble damage plaintiff must also show that he is a participant in the area of the economy in

[6] It is instructive to compare petitioner's claim with those of two other plaintiffs in the consolidated proceedings below: Sturtz and AMF Corp. All three complaints allege a restraint of trade in the research, development, manufacture and installation of emission control devices. As was the case in *Radovich*, *Radiant Burners*, and *Mandeville*, plaintiffs Sturtz (an inventor of emission control devices) and AMF (a manufacturer of devices) allege that the effect of this alleged conspiracy to restrain trade was to limit their opportunities to participate in the marketplace allegedly affected by respondent's conduct. By contrast, petitioner specifically disavows injury arising from any such market relationship.

which competition is restrained. Petitioner is no doubt correct in observing that some circuits have imposed additional limitations in particular fact situations, while others have not.[7] But this observation does him no good in the present case. There is no dispute whatever among the circuits as to the threshold requirements of injury *plus* a commercial relationship of some kind to the line of commerce allegedly restrained.

If there remain some linguistic differences in the way in which different circuits formulate the test,[8] this case is not an appropriate one for resolution of such differences, since the result would be the same under any of the formulations. Indeed, the court below, relying upon this Court's decision in *Perkins* v. *Standard Oil Co. of Calif.*, 395 U.S. 642 (1969), applied the most liberal test of all. It nevertheless denied standing because petitioner, as he concedes,[9] had no relationship of any kind to the relevant economic area.

Petitioner's suggestion of an "injury-in-fact" test is contravened by every judicial pronouncement in the field. This continuing judicial insistence on some commercial relationship reflects a unanimous assessment of the undesirability of opening the courts to multiple treble damage claims involving the most speculative and conjectural

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[7] For example, decisions of the Third Circuit—which petitioner suggests should govern in his case—have applied *additional* requirements of proximity or directness. Thus, *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) and *Gomberg* v. *Midvale Co.*, 157 F. Supp. 132 (E.D. Pa. 1955), *appeal dismissed sub nom., Brill* v. *General Industrial Enterprises, Inc.*, 234 F.2d 465 (3d Cir. 1956) denied standing under Section 4 because the plaintiff, albeit a participant in the endangered area of the economy, did not allege injury which was sufficiently "direct".

[8] Petitioner has not demonstrated that the application of these "conflicting" tests actually leads to divergent results. He certainly cannot claim that the two tests would lead to different outcomes on the facts of this case.

[9] *Supra*, p. 3.

types of proof, brought by persons who can show no connection with the market structures which the antitrust laws were designed to protect. Petitioner's invitation to discard all established tests applicable to standing under Section 4 should be declined.

II. The Court of Appeals did not err in relying in part on decisions of the Ninth Circuit.

Petitioner also contends that the court below erred by relying on decisions of the Ninth Circuit in construing Section 4. Petitioner appears to claim that the Court of Appeals' failure to rely instead upon the decisions of the Third Circuit, where he originally brought his action,[10] was tantamount to "forum shopping between circuits." Pet. at 12. Petitioner's concern rings false from a California citizen and resident, normally governed by Ninth Circuit decisions, who claims to be subject only to "Third Circuit law" because he chose to file his complaint in a federal court in Philadelphia. In any event, petitioner's contention does not withstand analysis.

In this Court petitioner claims to be entitled to a so-called Third Circuit standing test, although, as noted above, he does not and cannot argue that application of such a test would compel a different result in his case. Yet in the Court of Appeals petitioner belittled any differences between the antitrust standing tests applied in the Third and Ninth Circuits. In his brief below, petitioner characterized the Ninth Circuit's target area approach as "merely a picturesque expression" for the asserted test of the Third Circuit (Brief for Appellees at 15).[11] Indeed, petitioner's brief below affirmatively

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[10] Petitioner's case was transferred by the Multi-District Panel to the Central District of California for consolidated pretrial proceedings under 28 U.S.C. § 1407, along with numerous other related cases filed in various federal districts.

[11] *See also* Brief for Appellees at 23, 25, 28.

urged the Court of Appeals to rely upon the principles established in the Ninth Circuit: it accused respondents of a refusal "to give account to the principle that emerges from the developing law in this [the Ninth] Circuit". *Id.* at 22.

Petitioner's new position in this Court is purportedly based upon principles applied in diversity cases and limitations imposed by 28 U.S.C. § 1407. But the fact that the federal courts have a constitutional duty to apply the law of a particular state in diversity cases does not support petitioner's notion that a Court of Appeals must follow the "law" of another Circuit in construing federal statutes which are supposed to apply uniformly throughout the country. Nor does petitioner explain what there is about 28 U.S.C. § 1407 that prevents a Court of Appeals, on appeal from the decision of a Section 1407 transferee judge, from relying upon any appropriate authority in construing a federal statute or from acting as it would in any other case. "Section 1407", it has recently been held, "deals *only* with the powers of the Multi-District Litigation Panel, and not with the powers of the judge to whom the cases have been assigned by the Panel." *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124 (2d Cir. 1971) (emphasis in original).

In short, having successfully urged the court below to apply the liberal standing principles developed in the Ninth Circuit but having failed to meet even the minimal test required by those principles, petitioner now seeks intervention by this Court because the court did not

apply the allegedly different law of another Circuit. This is not a matter worthy of the Court's plenary attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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